BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

KAY L. GONZALES
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-430
Case No. 82-3363

S.S.A. No.

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. LA-25319

The Department appealed from the decision of the administrative law judge which held that the claimant was not ineligible under section 1252 of the Unemployment Insurance Code.

STATEMENT OF FACT

The claimant had been employed by the Employment Development Department as an intermittent employee since 1978. Such employees are permitted to work only 1500 hours per year unless a special permit or extension is issued by the employer's headquarters. In 1979 and 1980 the claimant had received such extensions. The normal practice was to lay off intermittent employees after the requisite number of hours had been worked and to furnish them a date to return to work after the beginning of the next calendar year.

The claimant last worked on November 25, 1981, at which time she was laid off. She had worked 1500 hours in 1981 but did not receive an extension. She was not given a return-to-work date. At that time there was considerable concern about the employer's budget due to uncertainty about the extent of Federal funding to be received.

The claimant filed a claim for unemployment benefits effective November 22, 1981. The Department instructed her to seek work. The claimant secured other employment on January 25, 1982. As of that time, she had still not received a date to return to work for the Department.

At the time of her layoff the claimant requested and received pay for three weeks of accumulated vacation. Pursuant to its policy, the Department allocated such pay to the three-week period beginning November 29, 1981 and ending December 19, 1981. These payments exceeded the claimant's weekly benefit amount. The Department issued a determination holding the claimant ineligible for the three-week period under section 1252 of the code.

The Department contends that the claimant was temporarily laid off; that a temporary layoff is not a "termination of employment" within the meaning of section 1265.5; and that therefore such vacation payments were wages within the meaning of section 1252 of the code.

REASONS FOR DECISION

Section 1252 of the code provides in part as follows:

> "(a) An individual is 'unemployed' in any week in which he or she meets any of the following conditions:
> (1) Any week during which he or she performs no services and with respect to which no wages are payable to him or her.
> (2) Any week of less than full-time work."

Section 1265.5 of the code provides:

> "Notwithstanding any other provision of this division, payments to an individual for vacation pay or holiday pay which was earned but not paid for services performed prior to termination of employment, or commencement of unemployment caused by disability, as the case may be, shall not be construed to be wages or compensation for personal services under this division and benefits payable under this division shall not be denied or reduced because of the receipt of such payments."

The Department cites Appeals Board Decision No. P-B-161 for the proposition that a temporary layoff is not a "termination of employment" within the meaning of section 1265.5, above quoted.

In Appeals Board Decision No. P-B-161 the claimant was laid off when the employer's plant was shut down for a previously announced four-week period, following which the claimant returned to work for the employer. During his layoff, the claimant filed a claim for unemployment benefits. The employer paid vacation pay to the claimant which was allocated to a portion of the four-week period. The Appeals Board held that there was no "termination of employment" within the meaning of section 1265.5 of the code and that the vacation payment to the claimant constituted wages. The Board stated in part:

> "In our prior decisions we have recognized that the legal question of whether an employment relationship is terminated or suspended may be extremely close or difficult to resolve (Appeals Board Decisions Nos. P-B-11, P-R-29, P-B-44, P-B-63, P-B-65, P-B-95, P-R-107, P-B-116, P-B-131, P-B-133, P-B-145 and P-B-155).
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> "In the present case, unlike the situations in Appeals Board Decisions Nos. P-R-29, P-B-34, P-B-75, P-B-92 and P-R-107, the claimant was not laid off for an indefinite period, but he was laid off for a definite period."

In Appeals Board Decision No. P-B-410 the employer regularly closed its plant between Christmas and New Year's. The Board held that holiday pay received for December 25 and December 26 constituted wages since the claimant was temporarily laid off with a definite date of recall and was not terminated from his employment.

In the present case, unlike the situations in Appeals Board Decisions Nos. P-B-161 and P-B-410, the claimant was given no definite date of recall following her layoff. The fact that she may have been placed on recall status is by itself of no consequence (Appeals Board Decision No. P-B-92). Considering the budgetary problems of the employer, it is problematical whether the claimant would ever have been recalled to work. It is clear that the claimant was laid off for an indefinite period of time.

Consequently, her employment was terminated within the meaning of section 1265.5 of the code and her vacation pay does not constitute wages.

DECISION

The decision of the administrative law judge is affirmed. The claimant is not ineligible under section 1252 of the code. Benefits are payable if the claimant is otherwise eligible.

Sacramento, California, December 9, 1982.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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